



## INTERIOR BOARD OF INDIAN APPEALS

Melody Ann Wright and Karleen McKenzie v. Acting Portland Area Director,  
Bureau of Indian Affairs

9 IBIA 277 (04/22/1982)

Denying reconsideration of:  
9 IBIA 147



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

MELODY ANN WRIGHT and  
KARLEEN McKENZIE,  
GUARDIAN AD LITEM

v.

ACTING AREA DIRECTOR, PORTLAND  
AREA OFFICE, BUREAU OF INDIAN  
AFFAIRS

: Order Denying Reconsideration  
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:  
: Docket No. IBIA 81-23-A  
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: April 22, 1982

On January 7, 1982, the Board issued a decision in this case holding that Phyllis Frances Cole was entitled to receive the share of judgment funds awarded to the Klamath Tribe that was due to James C. Wright, Jr., deceased Klamath Enrollee No. 2109. 9 IBIA 147 (1982). On February 8, 1982, the Board received a petition for reconsideration from appellants Melody Ann Wright and Karleen McKenzie. Appellants James Joseph Wright and Eshoni Wright (Segoviano) joined this petition on March 1, 1982. Appellee Phyllis Frances Cole opposed the petition on March 5, 1982.

As the Board noted in its prior decision, 25 U.S.C. § 565a(b) (1976) states that "a share [of the Klamath judgment fund] payable to a deceased enrollee shall be paid to his heirs or legatees upon the filing of proof of death and inheritance satisfactory to the Secretary of the Interior." Under this statute the Secretary is authorized to determine the heirs of a Klamath Indian dying intestate or the legatees of an Indian leaving a valid will, 1/ for the limited purpose of distributing judgment funds. Yvonne Weiser v. Area Director, Portland, 9 IBIA 76 (1981); Gertrude E. Sherman v. Acting Area Director, Portland, 9 IBIA 25, 88 I.D. 619 (1981). The question before the Secretary is not whether the decedent mentioned judgment funds in a will, when judgment funds become "property," or whether property acquired after the decedent's death can pass under a will, but rather whether the decedent indicated his desires concerning the disposition of his estate in a valid testamentary instrument.

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1/ In its January 7, 1982 decision the Board inaccurately used the term "heir" to describe appellee's status under decedent's will. The fact that appellee was not properly termed a "legatee" does not alter the conclusion reached by the Board on behalf of the Secretary under the statute.

In this case the Board held that appellee should succeed to decedent's share of the judgment fund. This holding was based upon the Board's construction of Clause 3 of decedent's will as a residuary clause. That clause states: "I give, devise and bequeath unto PHYLLIS FRANCES COLE, all of my properties, real, personal and mixed, together with all property of which I may have any power of appointment, absolutely and in fee simple."

Under Oregon probate law, "the cardinal principle to be applied in construing a will, when construction is necessary, is to ascertain from the entire instrument the expressed intention of the testator. We are taught to ascertain from the testamentary words, construed according to their natural meaning, the intent of the testator and to give effect to that intent unless the same is prohibited by some positive rule of law." In re Sessions' Estate, 217 Ore. 340, 341 P.2d 512, 526 (1959). 2/

From an examination of the entire will, it is apparent that although Clause 3 does not employ the usual words of a residuary clause such as "rest," "residue," or "remainder" in describing the property passed to appellee, 3/ and is followed by a dispositive clause giving \$1 to each of decedent's children, 4/ decedent intended to give all of his property to appellee and to divide his property among his children only if appellee predeceased him or died in a common accident. See Clause 5. The general principle that a residuary clause should be liberally and broadly construed in order to prevent partial intestacy, 5/ also suggests that, in the absence of any other disposition of the residue of a decedent's estate, a provision that is open to construction as a residuary clause should be broadly and liberally construed as a residuary clause. 6/

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2/ See also, In re Strome's Estate, 214 Ore. 158, 327 P.2d 414, 417 (1958); Heilig v. Daniel, 203 Ore. 123, 275 P.2d 854, 857 (1954), revised, 203 Ore. 123, 278 P.2d 988 (1955); In re Shepherd's Estate, 152 Ore. 15, 49 P.2d 448, 450-451 (1935); Beakey v. Knutson, 90 Ore. 574, 174 P. 1149, 1150-1151 (1918), rehearing denied, 90 Ore. 574, 177 P. 955 (1919).

3/ Such words are not required to pass the residue of an estate. See, e.g., In re Plumer, 159 Cal. App. 2d 389, 324 P.2d 346, 349 (1958); In re Kavanagh's Estate, 81 Colo. 152, 254 P. 161 (1927).

4/ A residuary clause need not be the final provision in a will. See, e.g., In re Plumer, supra, 324 P.2d at 349; In re Benson, 110 Mont. 25, 98 P.2d 868, 871 (1940).

5/ See, e.g., In re Palmer's Estate, 211 Ore. 342, 315 P.2d 164, 169 (1957).

6/ This conclusion would appear to have been shared by the State court judge presiding over the probate of decedent's estate who distributed the estate as though Clause 3 were a residuary clause.

Decedent's will was approved in probate by the Klamath County, Oregon, Circuit Court. Appellants presented no evidence to the Bureau of Indian Affairs or to the Board sufficient to support a conclusion that the will was invalid. They have still not presented such evidence. Although decedent's will provides a testamentary scheme that differs from what would occur under State laws of intestate succession, these differences are the reason for permitting an individual to dispose of property by will. Under the circumstances, the finding that appellee is the residuary legatee under decedent's will was supported by the evidence presented. Because of this finding, the Board held that appellee should receive decedent's share of the Klamath judgment funds. Appellants have not shown that this decision was in error and their petition for reconsideration is therefore denied.

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Wm. Philip Horton  
Chief Administrative Judge

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//original signed

Franklin D. Arness  
Administrative Judge

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//original signed

Jerry Muskrat  
Administrative Judge